Tetuan Teh Kim Teh, Salina & Co (a firm) v Tan Kau Tiah @ Tan Ching Hai & Anor

FEDERAL COURT (PUTRAJAYA) — CIVIL APPEAL NO 02(F)-21 OF 2010(W)

ARIFIN ZAKARIA CHIEF JUSTICE, RICHARD MALANJUM CJ (SABAH AND SARAWAK), HASHIM YUSOFF, ABDULL HAMID EMBONG AND AHMAD MAAROP FCJJ

29 MAY 2013

Civil Procedure — Appeal — Appeal to Federal Court — Appeal against decision of Court of Appeal in setting aside interpleader summons — Whether Court of Appeal had jurisdiction to make orders for damages — Whether preconditions under O 17 of the Rules of the High Court 1980 fulfilled

Civil Procedure — Interpleader proceedings — Interpleader summons — Interpleader reliefs — Solicitors held documents of title as stakeholder for parties involved in joint venture agreement — Parties in joint venture agreement disputed over termination of contract — Application for interpleader proceedings at High Court by solicitors — Whether to submit documents — Interpleader summons allowed and solicitors ordered to hold on to documents — Appeal and counterclaim for damages by one of contracting parties allowed by Court of Appeal — Whether solicitors surrendered documents

In the present appeal, the appellant ('the plaintiff') appealed against the decision of the Court of Appeal in setting aside the decision of the High Court pursuant to an interpleader application filed by the plaintiff. The first defendant, the developer of a land, had entered into a joint venture agreement with the second defendant and appointed the plaintiff, a legal firm. This was followed by a supplemental joint venture agreement ('the contract'). The contractual deadline on 21 March 2000 was extended to 22 March 2003. The land was sub-divided into 19 plots and 18 issue documents of title ('18 documents') were deposited with the plaintiff as stakeholders. By 22 March 2003, the first defendant did not commence nor complete construction. The second defendant terminated the contract and claimed for breach against the first defendant and for the return of the land together with damages and costs. The first defendant refused to accept the termination and blamed the second defendant for delaying the project. The solicitors for the second defendant sent notices notifying intention to arbitrate, to the first defendant and the plaintiff. The first defendant agreed but the plaintiff stated that it was not a party to the contract and declined to participate in the arbitration. The dispute between the defendants was then referred to arbitration and the arbitrator made an interim

award ('the award') in favour of the second defendant and, inter alia, ordered that the 18 documents be returned by the first defendant to the second defendant. In different applications to the High Court, the second defendant filed for leave to enforce the award while the first defendant applied for the removal of the arbitrator for misconduct. The plaintiff filed an interpleader summons under O 17 of the Rules of the High Court 1980 ('RHC') in the High Court. The High Court ordered the plaintiff to continue holding the 18 documents as stakeholders pending the disposal of the suits in the High Court by the defendants. Dissatisfied with the High Court's decision pertaining the plaintiff's application, the second defendant appealed to the Court of Appeal and counterclaimed for damages. Meanwhile, the High Court consolidated and heard together the applications by the defendants and dismissed the first defendant's application and granted leave to the second defendant to enforce the award. The plaintiff returned the 18 documents to the second defendant. The second defendant's appeal and counterclaim in the Court of Appeal was allowed, setting aside the decision of the High Court. The Court of Appeal ordered the plaintiff to return the 18 documents to the second defendant and allowed the counterclaim by the second defendant and ordered general, aggravated and exemplary damages (to be assessed by the Senior Assistant Registrar of the High Court('SAR')) for loss of use of the property, wrongful detention of the property. Dissatisfied, the plaintiff appealed to the present court against the Court of Appeal's decision in allowing the counterclaim made by the second defendant in opposing the plaintiff's application for interpleader summons, and in ordering general damages, aggravated damages and exemplary damages. The plaintiff submitted that the order of damages was wrong as the Court of Appeal had no jurisdiction to grant as such and that the liability for damages must be for an independent suit. It was further contended that if the second defendant was not happy with the plaintiff as a stakeholder, the second defendant must bring a separate action against the plaintiff.

Held, allowing the appeal with costs:

(1) Stakeholders should be impartial and should not play on the same side as one of the claimants. On the evidence, the finding of the Court of Appeal could be supported. Having so found, the Court of Appeal concluded that the plaintiff's application for interpleader relief should have been dismissed with costs by the High Court. Consequently, the Court of Appeal should only have set aside the decision of the High Court but it did not do so. Instead, it proceeded to consider the second defendant's counterclaim. In doing so, the Court of Appeal misdirected itself (see para 44).

(2) The court was not making any decision on the merits of the second defendant's counterclaim for damages or the plaintiff's averment in its defence. It could not and must not do so. The decision on the merits of the second defendant's claim for damages against the plaintiff and the

plaintiff's defence would have to be decided in the hearing which must be pursuant to filing of a separate action by the second defendant against the plaintiff, and not in the application for interpleader relief (see para 46).

(3) Having found that the requirements under O 17 r 1(a) and r 3(3)(b) of the RHC had not been satisfied, and having held that the application for interpleader relief should have been dismissed by the High Court, the Court of Appeal should have just set aside the decision of the High Court. The Court of Appeal could not then proceed to consider the counterclaim of the second defendant, allowed it and ordered damages, which was to be assessed by the SAR, to be paid by the plaintiff to the second defendant. The Court of Appeal had no jurisdiction to do so (see para 52).

(4) The Court of Appeal's order that general, aggravated and exemplary damages (to be assessed by the SAR) for loss of use of the property, wrongful detention of the property was set aside (see para 57).

(5) The order of the Court of Appeal that the 18 documents were to be returned was set aside. By the time the decision was made by the Court of Appeal, the 18 documents of titles had already been returned to the second defendant, rendering academic the order of the Court of Appeal directing the return of the documents. This was another reason why the order should be set aside (see para 58).

[Bahasa Malaysia summary

Dalam rayuan ni, perayu ('plaintif') telah merayu terhadap keputusan Mahkamah Rayuan yang mengetepikan keputusan Mahkamah Tinggi berikutan permohonan interplider yang difailkan oleh plaintif. Defendan pertama, pemaju tanah, telah memasuki perjanjian usaha sama dengan defendan kedua dan melantik plaintif, sebuah firma guaman. Ini diikuti dengan perjanjian usaha sama tambahan ('kontrak tersebut'). Tarikh akhir kontraktual pada 21 Mac 2000 telah dilanjutkan kepada 22 Mac 2003. Tanah tersebut telah disubbahagikan kepada 19 lot dan 18 surat ikatan hak milik ('18 dokumen') telah didepositkan dengan plaintif sebagai pemegang amanah harta. Menjelang 22 Mei 2003, defendan pertama tidak memulakan atau menyiapkan pembinaan. Defendan kedua telah menamatkan kontrak dan menuntut kerana pelanggaran terhadap defendan pertama dan untuk pemulangan tanah tersebut bersama dengan ganti rugi dan kos. Defendan pertama enggan menerima penamatan itu dan menyalahkan defendan kedua kerana melengah-lengahkan projek itu. Peguam cara defendan kedua telah menghantar notis-notis untuk memberitahu niat untuk menimbang tara, kepada defendan pertama dan plaintif. Defendan pertama bersetuju tetapi plaintif menyatakan bahawa ia bukan pihak kepada kontrak tersebut dan enggan menyertai penimbangtaraan. Pertikaian antara defendan-defendan kemudian telah dirujuk kepada penimbangtaraan dan timbang tara telah

membuat award interim ('award tersebut') menyebelahi defendan kedua dan, antara lain, memerintahkan agar 18 dokumen tersebut dipulangkan oleh defendan pertama kepada defendan kedua. Dalam permohonan lain kepada Mahkamah Tinggi, defendan kedua telah memfailkan untuk kebenaran menguatkuasakan award tersebut manakala defendan pertama telah memohon untuk penyingkiran timbang tara kerana salah laku. Plaintif telah memfailkan saman interplider tersebut di bawah A 17 Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT') di Mahkamah Tinggi. Mahkamah Tinggi telah memerintahkan plaintif untuk terus memegang 18 dokumen tersebut sebagai pemegang amanah harta sementara guaman-guaman di Mahkamah Tinggi selesai oleh defendan-defendan. Berasa tidak puas hati dengan keputusan Mahkamah Tinggi berkaitan permohonan plaintif, defendan kedua telah merayu kepada Mahkamah Rayuan dan menuntut balas kerana ganti rugi. Sementara itu, Mahkamah Tinggi telah menggabungkan dan mendengar bersama permohonan-permohonan tersebut oleh defendan-defendan dan menolak permohonan defendan pertama dan memberikan kebenaran kepada defendan kedua untuk menguatkuasakan award tersebut. Plaintif telah memulangkan 18 dokumen tersebut kepada defendan kedua. Rayuan dan tuntutan balas defendan kedua di Mahkamah Rayuan telah dibenarkan, mengetepikan keputusan Mahkamah Tinggi. Mahkamah Rayuan telah memerintahkan plaintif untuk memulangkan 18 dokumen tersebut kepada defendan kedua dan membenarkan tuntutan balas oleh defendan kedua dan memerintahkan ganti rugi am, tambahan dan teladan (ditaksir oleh Penolong Kanan Pendaftar Mahkamah Tinggi ('PKP')) untuk kehilangan penggunaan hartanah, penahanan salah hartanah tersebut. Tidak berpuas hati, plaintif telah merayu kepada mahkamah ini terhadap keputusan Mahkamah Rayuan yang membenarkan tuntutan balas dibuat oleh defendan kedua kerana membantah permohonan plaintif untuk saman interplider, dan kerana memerintahkan ganti rugi am, tambahan dan teladan tersebut. Plaintif berhujah bahawa perintah untuk ganti rugi tersebut adalah salah kerana Mahkamah Rayuan tiada bidang kuasa untuk memberikannya dan bahawa liabiliti untuk ganti rugi hendaklah suatu guaman yang berasingan. Adalah dihujah selanjutnya bahawa jika defendan kedua tidak berpuas hati terhadap plaintif sebagai pemegang amanah harta, defendan kedua hendaklah memulakan tindakan berasingan terhadap plaintif.

Diputuskan, membenarkan rayuan dengan kos:

(1) Pemegang amanah harta hendaklah bersikap adil dan tidak menyebelahi mana-mana pihak sebagai salah seorang daripada penuntut. Berdasarkan keterangan, penemuan Mahkamah Rayuan boleh disokong. Oleh demikian, Mahkamah Rayuan memutuskan bahawa permohonan untuk relief interplider plaintif patut ditolak dengan kos oleh Mahkamah Tinggi. Berikutan itu, Mahkamah Rayuan hanya patut mengetepikan keputusan Mahkamah Tinggi tetapi ia tidak berbuat demikian.

Sebaliknya, ia terus mempertimbangkan tuntutan defendan kedua. Dengan berbuat demikian, Mahkamah Rayuan telah salah arah (lihat perenggan 44).

(2) Mahkamah tidak membuat apa-apa keputusan atas merit berhubung tuntutan untuk ganti rugi defendan kedua atau penegasan plaintif dalam pembelaannya. Ia tidak boleh dan tidak patut berbuat demikian. Keputusan berdasarkan merit berhubung tuntutan untuk ganti rugi defendan kedua terhadap plaintif dan pembelaan plaintif perlu diputuskan dalam perbicaraan yang mana dibuat berikutan pemfailan tindakan berasingan oleh defendan kedua terhadap plaintif, dan bukan dalam permohonan untuk relief interplider (lihat perenggan 46).

(3) Setelah mendapati bahawa keperluan-keperluan di bawah A 17 k 1(a) dan k 3(3)(b) KMT tidak dipenuhi, dan setelah memutuskan bahawa permohonan untuk relief interplider patut ditolak oleh Mahkamah Tinggi, Mahkamah Rayuan sepatutnya mengetepikan keputusan Mahkamah Tinggi tersebut. Mahkamah Rayuan tidak boleh terus mengambil kira tuntutan balas defendan kedua, membenarkannya dan memerintahkan ganti rugi yang perlu ditaksirkan oleh PKP untuk dibayar oleh plaintif kepada defendan kedua. Mahkamah Rayuan tiada bidang kuasa untuk berbuat demikian (lihat perenggan 52).

(4) Perintah Mahkamah Rayuan agar ganti rugi am, tambahan dan teladan (untuk ditaksirkan oleh PKP) untuk kehilangan penggunaan hartanah, penahanan salah hartanah telah diketepikan (lihat perenggan 57).

(5) Perintah Mahkamah Rayuan agar 18 dokumen tersebut dipulangkan telah diketepikan. Pada masa keputusan dibuat oleh Mahkamah Rayuan, 18 dokumen hak milik tersebut telahpun dipulangkan kepada defendan kedua, menyebabkan perintah Mahkamah Rayuan menjadi akademik dengan mengarahkan pemulangan dokumen-dokumen tersebut. Ini adalah satu lagi sebab kenapa perintah tersebut patut diketepikan (lihat perenggan 58).]

Notes

For a case on interpleader summons, see 2(2) *Mallal's Digest* (4th Ed, 2012 Reissue) para 4303.

For cases on appeal to Federal Court, see 2(1) *Mallal's Digest* (4th Ed, 2012 Reissue) paras 870–893.

Cases referred to

Belcher and Others, Assignees of Maberly, a Bankrupt, v John Smith (1832) 9 Bing 82; (1832) 131 ER 545 (refd)

BP Benzin und Petroleum AG v European-American Banking Corporn [1978] 1 Lloyd's Rep 364, CA (not folld)

Chan King Sheen v KC Tsang & Co & Ors [2002] 3 HKC 209, CA (distd)

Chin Leong Soon & Ors v Len Chee Omnibus Co Ltd & Anor [1970] 2 MLJ 228, FC (refd)
De La Rue v Hernu, Peron & Stockwell Ltd [1936] 2 KB 164, CA (refd)
Fredericks and Pelhams Timber Buildings v Wilkins [1971] 3 All ER 545, CA (refd)
Glencore International AG v Shell International Trading and Shipping Co Ltd and another [1999] 2 All ER (Comm) 922, QBD (refd)
Karya Lagenda Sdn Bhd v Kejuruteraan Bintai Kindenko Sdn Bhd & Anor [2007] 6 MLJ 72, CA (refd)
Liberty National Bank & Trust Company of Oklahoma City v Acme Tool Division of Rucker Co [1976] USCA 10 159, CA (distd)
Malaysia Building Society Bhd v Tan Sri General Ungku Nazaruddin Ungku Mohamed [1998] 2 MLJ 425; [1998] 2 CLJ 340, CA (refd)
Metal Scrap Trade Corpn Ltd v Kate Shipping Co Ltd, The Gladys [1990] 1 WLR 115, HL (refd)
Mobikom Sdn Bhd v Inmiss Communication Sdn Bhd [2007] 3 MLJ 316; [2007] 3 AMR 195, CA (refd)
Oriental Bank Bhd v Abdul Razak Rouse [1986] 1 MLJ 509 (refd)
P B J Davis Manufacturing Co Ltd v Fahn (Fahn claimant) [1967] 2 All ER 1274, CA (refd)
Permodalan Plantations Sdn Bhd v Rachuta Sdn Bhd [1985] 1 MLJ 157, FC (refd)
Perwira Habib Bank (M) Bhd lwn Loo & Sons Realty Bhd & Satu Lagi (No 2) [1996] 3 MLJ 421, CA (refd)
RHB Bank Berhad v Comax Sdn Bhd [1998] MLJU 608; [1999] 3 CLJ 552, HC (refd)
SI & SI Sdn Bhd v Hazrabina Sdn Bhd [1996] 2 MLJ 509; [1996] 3 CLJ 657, SC (refd)
Sun Insurance Office v Galinsky [1914] 2 KB 545, CA (refd)
Watson v Park Royal (Caterers) Ltd [1961] 2 All ER 346, QBD (refd)

Legislation referred to

Arbitration Act 1952 ss 17, 27
Companies Act 1965 s 221
Federal Rules of Civil Procedure [US] r 13, 13(a)
Rules of Court 2012 O 17 r 5
Rules of the High Court 1980 O 17, O 17 rr 1, 1(a), 3, r 3(3)(b), 5, 5(2), 6, 7, 8, 9, 10, 11, O 18 r 19(1), O 28, O 28 rr 1, 7, 7(1), 7(2)
Rules of the Supreme Court 1965 [UK] O 17 rr 1, 5(2), 8, O 28 r 7(3)
Rules of the High Court (Cap 4A) [HK] O14

Appeal from: Civil Appeal No W-02–1080 of 2008 (Court of Appeal, Putrajaya)

A

Bastian Vendargon (Annou Xavier and Gene Vendargon with him) (Azri, Lee Swee Seng & Co) for the appellant.

Su Tiang Joo (Teh Eng Lay and Ong Ing Hou with him) (Cheah Teh & Su) for the second defendant.

B

Ahmad Maarop FCJ (delivering judgment of the court):

C BACKGROUND

[1] On 15 November 2010, leave was granted to the appellant (the plaintiff in the High Court) to appeal against the decision of the Court of Appeal dated 5 March 2010 which set aside the decision of the High Court dated 6 March 2008 pursuant to an interpleader application filed by the plaintiff. For convenience, in this judgment, we will refer to the parties as they were in the High Court.

D

E **[2]** The brief background facts which led to the present appeal are these. The plaintiff was appointed by the first defendant, to handle a joint venture agreement entered into by the first and the second defendants. The second defendant was the registered proprietor of all the land formerly held under EMR 8468, Lot No 2485 Mukim of Kapar, district of Klang ('the land'). The F first defendant was the developer of the land. A joint venture agreement was entered into between the first defendant and the second defendant on 22 March 1995 and this was followed by a supplemental joint venture agreement dated 23 April 1998 ('the contract'). The second defendant had, pursuant to the contract, duly executed a power of attorney in favour of the first G defendant. Under the contract, the first defendant agreed, at its own costs and expenses, to cause the land to be converted, sub-divided and eventually construct thereon a mixture of light industrial buildings in accordance with the layout and building plans as may be approved by the relevant authorities. Pursuant to the contract, the construction of the said buildings were to be H completed on or before 21 March 2000. This was not done and the contractual dateline was extended to 22 March 2003.

[3] The land was sub-divided into 19 plots and 18 issue document of titles were deposited with the plaintiff as stakeholders. It transpired that one plot of I the land was surrended to the relevant authorities without the prior knowledge and/or consent of the second defendant.

[4] The first defendant did not commence nor complete construction of any industrial buildings on the land by 22 March 2003. The only building

constructed on the land was a sewerage treatment plant which was meant to service the first defendant's neighbouring project. On the basis that the first defendant had breached the contract, the second defendant proceeded to terminate the contract and claimed for the return of the land together with damages and costs. The first defendant accused the second defendant of delaying the project and refused to accept the termination of the contract.

[5] By way of a letter dated 29 June 2005 and addressed to the plaintiff and the first defendant, the solicitors for the second defendant set out in detail the grievances of the second defendant. The plaintiff and first defendant were invited to make good on their breaches. The plaintiff was asked to return the document of titles to the land so as to mitigate the losses of the second defendant and to avoid costly legal action. The plaintiff and the first defendant were also given notice of the second defendant's intention to arbitrate. The first defendant agreed to resolve the dispute by way of an arbitration pursuant to the contract. But the plaintiff, by its letter dated 4 July 2005, declined to participate in the proposed arbitration proceedings and requested for a list of the proposed arbitrators for the first defendant's consideration. In a letter dated 26 July 2005, the plaintiff said that as it was not a party to the contract or any other agreement with the second defendant, the provision for arbitration of disputes was not applicable to it.

[6] The dispute between the first defendant and second defendant was then referred to arbitration. On 4 May 2007, the arbitrator made an interim award ('the award') in favour of the second defendant, and, inter alia, ordered that the 18 original issue documents of titles to the land be returned by the first defendant to the second defendant. On 8 May 2007 a copy of the award was personally served by the second defendant on the plaintiff. Notwithstanding the arbitral award and the repeated demands made by the second defendant to the plaintiff for the return of the 18 issue document of titles, the plaintiff refused to hand over the said titles. In this regard the plaintiff received letters dated 7–8 May 2007 from the second defendant requesting the plaintiff to hand over the 18 land titles based on the arbitral award.

[7] Meanwhile the plaintiff also received the letter dated 10 May 2007 from the first defendant's solicitors. In the letter the plaintiff was requested to take note that:

(a) the first defendant had applied to the High Court to remove the arbitrator in the matter on the grounds of misconduct;

(b) the first defendant had applied to amend that application to set aside the interim award also for misconduct;

(c) the first defendant had applied for injunction to restrain the arbitrator

and the second defendant from taking further steps in the matter and that that application was partly heard in the High Court; and

(d) the interim award had not been registered and it was the first defendant's intention to vigorously oppose any application to register the same.

[8] The first defendant's solicitor then expressed the first defendant's view that the titles should be held by the plaintiff as stakeholder until the dispute was resolved.

[9] In its letter dated 10 May 2007, the plaintiff conveyed its reluctance to release the 18 land titles to second defendant. Then in the letter dated 21 May 2007, the second defendant's solicitors demanded that the plaintiff return the issue documents of titles to the second defendant within 48 hours.

[10] Faced with the demand of the second defendant who wanted the documents of titles to be returned to him, and the view expressed by the first defendant to the plaintiff that the titles should be held by plaintiff until the dispute between the defendants was resolved, the plaintiff proceeded to file in the High court an interpleader summons under O 17 of the Rules of the High Court 1980 ('RHC').

[11] On 6 March 2008 the learned judicial commissioner of the High Court allowed the plaintiff's interpleader application, and ordered that the plaintiff continue to hold the 18 issue documents of titles as stakeholders pending the disposal of the suits in:

(a) the Kuala Lumpur High Court Originating Summons No R1–24–51 of 2007 which was an application filed by the second defendant for leave to enforce the arbitral award; and

(b) the Kuala Lumpur High Court Originating Motion No R2–25–76 of 2007 which was an application filed by the first defendant for the removal of the arbitrator for misconduct and to restrain the said arbitrator from further conducting the arbitral proceedings.

[12] Dissatisfied with the decision of the High Court, the second defendant appealed to the Court of Appeal.

[13] It is also pertinent to state that later, Originating Summons No R1–24–51 of 2007 and Originating Motion No R2–25–76 of 2007 were consolidated and heard together with Kuala Lumpur Originating Motion No R2–25–133 of 2007. On 14 July 2009, the High Court made the following orders:

(a) in the Originating Motion No R2–25–133 of 2007, it dismissed the first defendant's application to set aside the arbitral award;

(b) in the Originating Summons No R1–24–51 of 2007, it granted leave to the second defendant to enforce the award;

(c) in the Originating Motion No R2–25–76 of 2007 it dismissed the first defendant's application for injunction; and

(d) in the Originating Motion No R2–25–133 of 2007 it dismissed the plaintiff's application to intervene.

[14] Pursuant to the High Court's decisions dated 6 March 2008 and 14 July 2009 as aforesaid, on 11 August 2009 the plaintiff returned the 18 documents of titles to the second defendant.

[15] On 5 March 2010 the Court of Appeal allowed the second defendant's appeal with costs. It set aside the decision of the High Court dated 6 March 2008. The Court of Appeal ordered the plaintiff to return the 18 original titles to the land to the second defendant forthwith and not later than ten days from the date of service of the Court of Appeal's order. In addition, the Court of Appeal also considered and allowed the counterclaim made by the second defendant and made the following order:

(a) general damages for loss of use of the aforesaid property, aggravated damages for wrongful detention of the property, and exemplary damages are to be assessed by the senior assistant registrar of the High Court at Kuala Lumpur and once assessed they are to be paid to the second defendant by the plaintiff. The costs of such assessments are to be borne by the plaintiff; and

(b) all damages are to carry interest at 8%pa from 4 May 2007 until one day before the order to be made. Thereafter, on all heads of damages including pre-order interest would be at 8%pa from the date of the order until full realisation thereof.

[16] Dissatisfied with the aforesaid decision, the plaintiff applied to this court for leave to appeal against that decision. Leave to appeal was granted to the plaintiff on the following question of law ('the leave question'):

> Can damages be awarded pursuant to a counterclaim by way of an affidavit used in an interpleader originating summons proceeding brought under Order 17 of the Rules of the High Court 1980?

DECISION

[17] In this appeal, the complaint of the plaintiff is not against the decision of the Court of Appeal ordering the return of the 18 documents of titles to the second defendant. The plaintiff had returned the documents of titles to the

second defendant on 11 August 2009. As is clear from the memorandum of appeal, the complaint of the plaintiff is against the decision of the Court of Appeal in allowing the counterclaim (which was not set down for hearing) made by the second defendant in his affidavit filed in opposing the plaintiff's application for interpleader summons, and in ordering general damages, aggravated damages and exemplary damages (which were to be assessed by the senior assistant registrar of the High Court) and interests to be paid by the plaintiff to the second defendant. The Court of Appeal, had, on 5 March 2010, held that the plaintiff's application for interpleader relief should have been dismissed by the High court. The Court of Appeal did not stop there but proceeded to consider the second defendant's counterclaim, allowed it and made the aforesaid order of damages against the plaintiff in favour of the second defendant. This, the plaintiff contended was wrong. Learned counsel for the plaintiff submitted that in respect of an interpleader summons, the jurisdiction of the court was limited to allowing or dismissing it with ancillary orders regarding the subject matter of the interpleader proceeding (the 18 documents of titles in this case). He argued that the court had no jurisdiction to grant any form of damages for alleged torts, like the tort of abuse of powers etc. Liability for damages must be for an independent suit. To recover damages for such tort, the aggrieved party must file a civil suit against the tortfeasor. Continuing his submission, learned counsel argued that local legal provisions on interpleader which were adopted from the English practice were specific provisions. He contended that if the second defendant was not happy with the plaintiff in his conduct as a stakeholder in this case, he must bring a separate action against the plaintiff. He said even if there were some elements of collusion on the part of the plaintiff, separate action must be brought. In support of his submission learned counsel cited the case of *SI & SI Sdn Bhd v Hazrabina Sdn Bhd* [1996] 2 MLJ 509; [1996] 3 CLJ 657 where in the context of a winding up petition, it was held by the Federal Court that the court, on hearing the petition which was governed by s 221 of the Companies Act 1965, may dismiss it with or without costs, adjourn it conditionally or unconditionally or may make an interim or other order that it thought fit. There was no provision for the court when dismissing the petition, to award damages to the respondent, although an affidavit in opposition to the petition may pray for damages. A claim for damages should not be brought under a winding up petition or in an application to strike out the said petition under O 18 r 19(1) of the RHC, but ought to be filed as a separate action by way of writ for malicious prosecution or an abuse of the process of the court. Learned counsel also cited the Court of Appeal case of *Malaysia Building Society Bhd v Tan Sri General Ungku Nazaruddin Ungku Mohamed* [1998] 2 MLJ 425; [1998] 2 CLJ 340 for the proposition that the powers that may be exercised under the court's jurisdiction must be discovered in the specific legislation enacted by Parliament upon the subject. Learned counsel submitted that the local legal provisions on interpleader proceeding did not confer jurisdiction on the court to award damages in a counterclaim made in an affidavit filed in

opposition to an interpleader summons asking for interpleader relief. In the alternative, learned counsel submitted that the issue on the damages claimed by the second defendant in his affidavit in opposition to the interpleader application must be set down for trial.

[18] For the second defendant, apart from the written submissions and written reply filed for the purpose of the hearing of the present appeal as well the oral submission made during the hearing, learned counsel for the second defendant also filed with the leave of this court, further written submission and authorities, followed by a written clarification dated 5 April 2012. The thrust of the submission of learned counsel for the second defendant is as follows. At the outset learned counsel stressed that the case before the court was one concerning breach of undertaking by the plaintiff as solicitors rather than interpleader relief. Quoting Abraham Lincoln, learned counsel said 'a lawyer's word is his bond'. Relying on letters dated 4 July 2005, 30 March 2007 and 6 April 2007, learned counsel contended that that the plaintiff had expressly undertaken to release the 18 documents of titles upon the decision of either the arbitrator or the High Court as the case may be. In this regard learned counsel referred to the words used by the plaintiff in the three letters which are as follows:

> … we, as stakeholders of the title deeds, can only act according to the final decisions or instructions of the proper forum. … Any matter relating to the above issue shall be dealt with by the proper forum and handled professionally by the solicitors for the parties and *we will act upon the final decisions or instructions of the proper forum.*

(the letter dated 4 July 2005 in pp 20–21 or Tab 3 in the core bundle).

> … we cannot release those titles which are in our custody to any party *until our receipt of a valid and binding Order from* either *the arbitrator* or the High Court, as the case may be, in that respect.

(the letter dated 30 March 2007 in p 23 or Tab 5 in the core bundle).

> Our position is that all issues relating to the above matters *must be left to be decided by the arbitrator* and/or the Court, as the case may be.

(the letter dated 6 April 2007 in p 24 or Tab 6 in the core bundle).

[19] Learned counsel argued that the plaintiff's words in the three letters as aforesaid amounted to an undertaking — a promise made by the plaintiff as solicitors even though the word 'undertake' was not used. *Oriental Bank Bhd v Abdul Razak Rouse* [1986] 1 MLJ 509 was cited as the supporting authority. Learned counsel contended that that undertaking must be honoured when the arbitral award was delivered on 4 May 2007 and served on the plaintiff on 8 May 2007. However, according to learned counsel, the plaintiff failed to honour its words. Learned counsel added that the documents of titles were only

returned on 11 August 2009. That is the first premise of the second defendant's argument. Next, learned counsel submitted on the requirements under O 17 r 1(a) of the RHC which must be established by the plaintiff to be entitled to interpleader relief. Firstly, learned counsel submitted that there were no competing/adverse claims between the first and the second defendants over the documents of titles. The titles were at all material times registered in the name of the second defendant, and the first defendant had never claimed ownership over the titles. In the arbitration, the first defendant prayed for monetary compensation. According to learned counsel, the applications in the High Court after the arbitral award was made by the arbitrator, were concerned only with removal of the arbitrator, setting aside of the arbitral award and the enforcement of the award. There was therefore no 'real foundation or expectation' by the plaintiff to be sued by the second defendant. *Chin Leong Soon & Ors v Len Chee Omnibus Co Ltd & Anor* [1970] 2 MLJ 228, *RHB Bank Berhad v Comax Sdn Bhd* [1998] MLJU 608; [1999] 3 CLJ 552 and *Sun Insurance Office v Galinsky* [1914] 2 KB 545 were cited as supporting authorities. Secondly, learned counsel submitted that the plaintiff had colluded with the first defendant. He argued that collusion which would disentitle the plaintiff to interpleader relief need not be a collusion or conspiracy with fraudulent intent. All that need to be shown was that the plaintiff was playing on the same side as that of the first defendant. In this regard, learned counsel highlighted the facts referred to by the Court of Appeal in support of its finding of collusion between the plaintiff and the first defendant. These facts were that Teh Kim Loh, the director of the first defendant who affirmed the affidavits for and on behalf of the first defendant and Teh Kim Teh, a partner of the plaintiff who affirmed the affidavits for and on behalf of the plaintiff, were brothers. Madam Wong Kooi Heong, another partner of the plaintiff was the wife of Teh Kim Teh and thus, the sister in law of Teh Kim Loh, the director the first defendant. Learned counsel submitted that therefore O 17 r 3(3)(b) of the RHC had not been complied with. Thus, according to learned counsel, the Court of Appeal was right in its ruling that the plaintiff's interpleader relief should have been dismissed by the High Court.

[20] Continuing his submission, learned counsel argued that in this case the breach of undertaking preceded the interpleader application. Quoting *Belcher and Others, Assignees of Maberly, a Bankrupt, v John Smith* (1832) 9 Bing 82; (1832) 131 ER 545, learned counsel submitted that in good conscience and equity, a lawyer who had given his words could not be allowed to evade his obligations and extricate himself from his undertaking by resorting to interpleader proceeding, and that the plaintiff must be held accountable for the breach of his undertaking for which he had no defence at all which would attract damages in the same manner as a breach of contract. Learned counsel contended that the interpleader application in this case which was misconceived in the first place, did not absolve the plaintiff of its liability for breach of its undertaking to the second defendant, nor deny the second

defendant of his rights to enforce the undertaking and to damages for breach of the same. Learned counsel submitted that damages could be awarded against the plaintiff in the interpleader proceeding. In support of his submission on this point learned counsel relied on *Liberty National Bank & Trust Company of Oklahoma City v Acme Tool Division of Rucker Co* [1976] USCA 10 159, and the Hong Kong case of *Chan King Sheen v KC Tsang & Co & Ors* [2002] 3 HKC 209. Further, learned counsel submitted that the filing of the counterclaim in this case, was permissible under O 28 r 7(1) of the RHC which provides that a defendant 'who has any claim oris entitled to any relief or remedy against the plaintiff in respect of any matter (whenever and however arising) may make a counterclaim in the action in respect of that matter instead of bringing a separate action'. Learned counsel then submitted on the meaning of a counterclaim, and for this he referred to the Federal Court judgment in *Permodalan Plantations Sdn Bhd v Rachuta Sdn Bhd* [1985] 1 MLJ 157:

> What then is a counterclaim?
>
> A counterclaim on the other hand is also a cross-claim which a defendant has against a plaintiff but in respect of which the defendant can bring a separate action against the plaintiff if he wishes to do so. Thus, to all intents and purposes a counterclaim is a separate and independent action by the defendant, which the law allows to be joined to the plaintiff's action in order to avoid multiplicity or circuity of suits.

[21] Learned counsel submitted that the second defendant's counterclaim was entirely proper and could stand and be considered even if the claim for interpleader relief fell. In support of his submission learned counsel relied on *Karya Lagenda Sdn Bhd v Kejuruteraan Bintai Kindenko Sdn Bhd & Anor* [2007] 6 MLJ 72.

[22] On the leave question, learned counsel submitted that the answer ought to be in the affirmative. For reasons which we will set out shortly, we are unable to accept that submission of the learned counsel for the second defendant.

[23] As a starting point we will deal with the authorities relied upon by learned counsel in support of his submission. First, the *Liberty National Bank & Trust Company of Oklahoma City*, the decision of the United States Court of Appeal, Tenth Circuit which learned counsel contended was directly on the point. From the judgment of the court the facts of the case are these. In 1966 or 1967, one Hazel Bailey who was then residing in Oklahoma City with her daughter (Jo Ann Bailey Clark) and son-in-law (Michael C Clark) invested $20,000 in US Treasury Bills through the appellant Liberty Bank. In 1969, Mrs Bailey's son-in-law and daughter, Michael C Clark and Jo Ann Bailey Clark, started an oil drilling company called Taurus. For this they commenced borrowing from Liberty National Bank, the appellant. In 1968 Mrs Bailey had two outstanding notes which were payable to Liberty National Bank in an

amount exceeding $10,000. One of her treasury bills had been pledged as collateral for payment of this. When the bills matured they were cashed and the $20,000 was deposited in Mrs Bailey's checking account at the Liberty Bank. On that day two promissory notes, which were due and payable, were satisfied from her checking account, as was an obligation in the amount of $908.89, which had accrued in connection with her Bank Americard. There was a remaining balance of $8,308.44, which was used by Mrs Bailey to purchase a certificate of deposit ('CD') in the name of her daughter. At the same time, she appropriated an additional $11,000 for purchase of an additional CD. This was also loaned to her daughter for use as collateral in connection with the business enterprise. During the times that the described dealings were occurring the Clarks were indebted to Liberty. According to Mrs Bailey, the monies which she made available to the Clarks in the form of the CD's were loans and were not gifts. Later, the CD's which she had turned over, were cashed and the proceeds were applied by Liberty to the Taurus note. Bank officers at that time advised Michael Clark that a $19,000 note ought to be given to Mrs Bailey to evidence her loans and at that time such a note was given, secured by a security interest in the Taurus drilling rig in which Liberty Bank had been given a prior security interest. A financing statement evidencing this transaction between Mrs Bailey and the Clarks was filed on 7 March 1972, some four months after the note was executed. Needless to say, none of the $19,000 note or interest was ever paid by Taurus to Mrs Bailey.

[24] As a result of a discussion with one of the Liberty Bank officers, Mr Clark agreed to surrender the drilling rig to Liberty so that there could be a sale of it and the proceeds could be used to pay the debt of Taurus to Liberty. Accordingly, the rig was surrendered to Liberty in March 1972, and Liberty proceeded to sell it. It had no previous experience in selling an oil rig and so the officers inquired or investigated as to the usual manner of such sales. Liberty was told that the ordinary method for selling a drilling rig was to employ an auctioneer to move the rig to a convenient location to clean and paint it and then notify interested persons and, in addition, advertise the sale in trade journals and newspapers. The bank followed none of these suggestions. Indeed, it sold the rig without any professional help. Notices were sent to 16 creditors, including Taurus, and to some 19 other companies. Mrs Bailey did not receive notice except information furnished by her son-in-law. The rig was neither cleaned, painted nor dismantled. Liberty did not move it to a convenient site, but sold it at the place where it had been near Perryton, Texas. The sale was conducted by an attorney for Liberty who had never conducted an auction of an oil rig or oil field equipment and who lacked experience in the oil business. After the price reached $37,000, there were only two bidders. The final sale price, $42,000, was sufficient to pay off the Taurus note and pay the expenses of sale, but left little for the other creditors. The rig had been appraised at $60,000 to $80,000. The successful bidder was Raymond Hefner of Bonray Oil Company and Miller & Miller Auctioneers. In June 1972, Miller & Miller

sold the equipment for $77,705.50. The district court determined that there had not been a significant change in the market condition between 28 March 1972, the date of the original sale, and June 6, when the property was resold. Bonray Oil and Miller & Miller realised a net profit of $19,175.56. Based upon its finding that Liberty had not acted in good faith and had been preoccupied with recovering their indebtedness, the district court found for the plaintiff, determining that the equipment had not been sold at the current price in a recognised market nor in the usual manner nor in conformity with reasonable commercial practices among oil field equipment drillers.

[25] After payment satisfying its indebtedness, Liberty filed a suit in interpleader and deposited the remaining sum $4,065.67 for distribution to the remaining creditors. Mrs Bailey, in turn, filed a counterclaim seeking damages alleging that she had a security interest in the drilling rig and that the sale was not carried out in a commercially reasonable manner in conformance with the UCC, section 9-504. The trial court found in favour of Mrs Bailey and entered judgment in her favour and against Liberty in the amount of $19,000, together with attorney's fees. In its appeal, Liberty Bank contended that the trial court lacked jurisdiction to entertain the counterclaim and to award affirmative relief to Mrs Bailey and against Liberty. Liberty relied on the proposition that it was a mere disinterested stakeholder. As a result, Mrs Bailey was not an opposing party within the meaning of r 13. Now, in that case it is true that the court did not accept Liberty's contention and upheld Mrs Bailey's counterclaim. However, Mrs Bailey's counterclaim was compulsory under the applicable rules of civil procedure. She was exposed to the hazard of losing it altogether if it could not be maintained in the interpleader action. This is clear for the judgment of the court:

> *Mrs Bailey's counterclaim is compulsory. She is exposed to the hazard of losing it altogether if it cannot be maintained in the interpleader action.* If, of course, the counterclaim is held to be jurisdictionally impermissible, she might not lose it and yet it is so potentially confusing that she could very well be deprived of it in subsequent litigation in another court, for the judge in the other court might take the position that it had to have been asserted and tried in the other litigation.
>
> … where a stakeholder has initiated the action it is reasonable to conclude that he has opened himself up to counterclaims. … Accordingly, *it is our conclusion that the trial court had jurisdiction to entertain the compulsory counterclaim. It had jurisdiction as well to award damages.*

[26] In this regard, r 13(a) of the Fed R Civ P provides for compulsory counterclaim:

> Rule 13(a) provides as follows:

A (a) *Compulsory Counterclaims. A pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party,* if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction. But the pleader need not state the claim if (1) at the time the action was commenced the claim was the subject of another pending B action, or (2) the opposing party brought suit upon his claim by attachment or other process by which the court did not acquire jurisdiction to render a personal judgment on that claim, and the pleader is not stating any counterclaim under this Rule 13.

C

[27] There is no provision for compulsory counterclaim in the Malaysian civil procedures. So, in our view the case of *Liberty National Bank* is distinguishable from the case before this court.

D **[28]** Next is the decision of the Hong Kong Court of Appeal in *Chan King Sheen v KC Tsang*, another authority which learned counsel for the second defendant contended was also directly on the point under consideration by this court. We do not think so. In that case, the defendant was a firm of solicitors who used to act for the plaintiff. The plaintiff was an elderly widow who had E emigrated to the US with her husband 50 years ago. Her husband died in 1964. He was a founding member of the Shun Kwong Investment & Trust Co Ltd ('SKI'), formed by the Ng and Lee families, which invested in real estate. The plaintiff was the beneficiary of the deceased's estate, which comprised, inter alia, 576 shares in SKI. The deceased's shares remained registered in his name. F In April 2000 Samuel Tak Lee ('ST Lee') approached the plaintiff saying he was a member of the Lee family who had a prospective interest in SKI from his mother's estate and he wished to acquire the plaintiff's shares in SKI. The plaintiff gave him two powers of attorney, granting him power to exercise her voting rights to pursue the dividends due but unpaid and to cause the estate's G share to be registered in her name, all free to her. In June 2000, ST Lee instructed the defendant to represent the plaintiff in getting the estate's shares registered in her name and to pursue unpaid dividends. The defendant was also instructed by three other SKI shareholders (second to fourth intended defendants). A winding up petition was presented to wind up SKI on their H behalf and the plaintiff was joined as the fourth petitioner. The plaintiff said this was done without her consent or approval. On 8 November 2000, the plaintiff terminated the defendant's retainer and asked that the documents be turned over to her new solicitors. The defendant refused to do so. Meanwhile the plaintiff applied to the court to withdraw from the petition. The defendant I instructed counsel to oppose the application on behalf of the first three petitioners. On 19 December 2000, the plaintiff was given leave to withdraw as the fourth petitioner. The plaintiff's new solicitors again demanded the defendant to return the plaintiff's documents, but the defendant indicated that their client, ST Lee did not want the documents released without his consent.

The plaintiff's solicitors later again demanded the documents, but was told that the defendant had received a letter from solicitors acting for ST Lee also demanding the documents. The plaintiff commenced these proceedings against the defendant seeking the return of her documents. There were three summonses before the court below: the plaintiff's summons for summary judgment under O 14 seeking an order for the return of documents and an assessment of damages, the defendant's interpleader summons and the defendant's summons to strike out certain paragraphs from the plaintiff's statement of claim. On the O 14 summons, the judge granted final judgment against the defendant following the issue of a writ. The defendant was ordered to deliver and/or return the plaintiff's documents. The learned trial judge also ordered an assessment of damages. The learned trial judge dismissed the defendant's application for interpleader relief. On the striking out application, only one paragraph in the statement of claim was ordered to be struck out. The defendant's appeal was dismissed.

[29] It is clear that *Chan King Sheen* is distinguishable from the present appeal. In Chan King Sheen the court was not dealing with any counterclaim for damages by the defendant. Indeed there was no counterclaim in that case. The order for an assessment of damages in favour of the plaintiff was made in the plaintiff's O 14 summary judgment application in which she sought an order for assessment of damages.

[30] This brings us to the local case of *Karya Lagenda Sdn Bhd*. In that case the second defendant was the main contractor for Sri Rampai Project ('the project'). The first respondent was the sub-contractor engaged by the second defendant for the project. At the request of the first defendant, the plaintiff issued a Bankers Guarantee No TF001G784990 dated 27 June 2003 ('bank guarantee') for the sum of RM2,075,700.94 in favour of the second defendant. The bank guarantee was arranged for by the first defendant as required in the building contract between the first and second defendant. Disputes arose between the first and second defendant in the performance of the building contract. The second defendant alleged that the works were not completed on time by the first defendant as stipulated in the building contract even after an extension of time was granted by the second defendant. Subsequently, the second defendant made a demand on the bank guarantee. The first defendant challenged the validity of the demand. Hence, no payment was made to the second defendant by the plaintiff. The first defendant then demanded the release of the fixed deposit funds, secured for the granting of the bank guarantee. The plaintiff did not accede to the same. On 13 May 2005, the plaintiff commenced an interpleader proceeding in the High Court to determine the question whether, inter alia, there was liability to pay on the bank guarantee. The first defendant in turn made a counterclaim against the plaintiff for the release of the first defendant's fixed deposit funds. The High

Court decided in favour of the second defendant. The first defendant's counterclaim was accordingly dismissed.

[31] The main question before the High Court and the Court of Appeal was whether the second defendant's demand was valid to trigger payment of the bank guarantee. The issue as to the release of the fixed deposit funds would hinge on the outcome of the main question. If the plaintiff did not have to pay out of the bank guarantee, the plaintiff had to release the fixed deposit funds to the first defendant. It is true that in that case there was a counterclaim made by the first defendant against the plaintiff. But it was not a counterclaim for the damages against the plaintiff. It was for the release of the first defendant's fixed deposit fund utilised as security for the granting of the bank guarantee. The counterclaim was dismissed by the High Court. More importantly, it appears that the validity of the counterclaim was not raised in the High Court and indeed in the Court of Appeal. The courts were not called upon to decide on the issue of whether the counterclaim could or could not be made in the interpleader proceeding. The main question before the courts was whether the second defendant's demand was valid to trigger payment of the bank guarantee. This depended on the issue whether the guarantee was an 'on demand' (unconditional) guarantee. The High Court and the Court of Appeal answered the question in the affirmative. Such being the case all that was required to activate the guarantee was a written demand by the second defendant. Notwithstanding any contestation by the first defendant, payment should be made by the plaintiff when a valid demand was made by the second defendant. The first defendant was granted leave to appeal to this court. In the hearing of the appeal in this court, four questions of law were posed for determination by the court. None of the questions was on or related to the issue as to whether the counterclaim of the first defendant was validly made in the interpleader proceeding in the High Court. To us, *Karya Lagenda* is not really an authoritative authority in support of the contention of learned counsel for the second defendant.

[32] In our view, the search for the answer to the leave question inevitably involves the consideration of the nature and object of the interpleader proceedings. Appreciation of the nature, object and purpose of the interpleader provisions would certainly assist in the determination of the court's jurisdiction in interpleader proceedings. The provisions relating to interpleader proceedings are housed in O 17 of the RHC. It is based on English practice. Order 17 r 1 of the RHC which embodies the essence of interpleader application was taken from O 17 r 1 of the RSC 1965. Order 17 r 1 of the RHC provides:

> Where —
>
> (a) a person is under a liability in respect of a debt or in respect of any money,

goods or chattels and he is, or expects to be, sued for or in respect of that debt or money or those goods or chattels by two or more persons making adverse claims thereto; or

(b) claim is made to any money, goods or chattels taken or intended to be taken by the Sheriff in execution under any process, or to the proceeds or value of any such goods or chattels, by a person other than the person against whom the process is issued,

the person under liability as mentioned in sub-paragraph (a), or (subject to rule 2) the Sheriff, may apply to the Court for relief by way of interpleader.

[33] Although an application for interpleader relief must be made by originating summons (O 17 r 3(1) of the RHC), the interpleader summons is a specific kind of originating summons for which special provisions have been made under O 17 of the RHC. It is therefore a type of originating summons excepted under O 28 r 1 of the RHC from the originating summons procedure under O 28 of the RHC. In this regard O 28 r 1 of the RHC provides:

The provisions of this Order apply to all originating summonses *subject in the case of originating summonses of any particular class, to any special provisions relating to originating summonses of that class made by these rules or by or under any written law;* and, subject as aforesaid, Order 32 rule 5, shall apply in relation to originating summonses as it applies in relation to other summonses.

[34] Order 17 r 1(a) of the RHC is the provision for what is known as stakeholder's interpleader. Under this provision a person who holds any money, goods or chattels which he does not claim, or is under liability for a debt and he expects to be sued in respect of that money, goods or chattels by two or more persons, that person can protect himself from an action and the costs of such an action by calling on these claimants to interplead, in other words, to claim against one another, so that the court can decide to whom the money, goods or chattels belong (*Mahal's Supreme Court Practice*, (2nd Ed), Vol 1, 1983). The nature of an interpleader is lucidly explained in *De La Rue v Hernu, Peron & Stockwell Ltd* [1936] 2 KB 164 (referred to by this court in *Chin Leong Soon & Anor* [1970] 2 MLJ 228. See also *Glencore International AG v Shell International Trading and Shipping Co Ltd and another* [1999] 2 All ER (Comm) 922). In *De La Rue*, Mrs De La Rue deposited certain furniture, household linen and silver for storage with Hernu, Peron & Stockwell, Ltd, who were warehousemen. Mrs De La Rue's husband, claiming that the goods so deposited were his property, issued a writ in detinue against the warehousemen for the delivery up of the goods. On 22 January 1936, Mr De La Rue obtained an order for an interim injunction restraining the warehousemen for one month from parting with possession of the goods. Mrs De La Rue, claiming that the goods were hers, threatened to institute proceedings against the warehousemen to prevent the delivery up of the goods to her husband. The warehousemen thereupon

took out an interpleader summons and on 13 Feb 1936, an order was made by the master staying all proceedings in the action by Mr De La Rue against the warehousemen. The master further ordered that no action be brought against the warehousemen by either Mr or Mrs De La Rue, and that the parties should proceed to the trial of an issue before a master of the King's Bench Division to determine the ownership of the goods, and that in that issue Mr De La Rue was to be the plaintiff and Mrs De La Rue was to be the defendant. Mrs De La Rue appealed to the judge in chambers, who dismissed the appeal. Mrs De La Rue then appealed to the Court of Appeal which dismissed the appeal with costs. The Court of Appeal reviewed the history and nature of interpleader proceedings and in the course of which opined, inter alia, that they were not in the nature of an action. In his judgment Greer LJ said:

> In this case Mrs Dr La Rue deposited certain furniture with a firm called Hernu, Peron & Stockwell, Ltd, warehouse owners, and her husband, Mr De la Rue, issued a writ against the warehousemen claiming that the property was his, and claiming that the property should be delivered up to him. Undoubtedly he was entitled at common law, and apart from the statute, to bring that action, and to continue it to a conclusion; and if he could have established his title to the goods, he would then have been, apart from the interpleader proceedings, entitled to a judgment against the warehousemen; and in the same way, as the law now is, Mrs De La Rue could also have brought an action against the warehousemen, and either had judgment in her favour or judgment against her.
>
> There was a time when a person in the position of a warehouseman had no means of obtaining relief from that difficult position in which he was placed by two claims being made against him by different persons and he having to decide for himself, without adequate information or means of obtaining it, *which of them he should account to for the goods,* or, it might be, the money in his possession. It was considered by the legislature that that was putting a person in the position of the defendants in this action, Messrs Hernu, Peron & Stockwell, in a difficult position, and that it was unjust that they should be without some form of relief; and then by statute relief was given to a defendant so sued, or threatened with claims, by means of interprleader proceedings. *The whole object of those proceedings was for the purpose of enabling the warehouseman, or a person in the position of stakeholder, to get relief, and get it decided as to which of the two claimants he had to account to for the goods or money that he held;* and every part of the interpleater proceedings was a part of proceedings intended for the benefit of the warehouseman, the third party, the defendant, who had rival claims made against him. *It would have been leaving the relief in an unfortunate position if the interpleader rules, or the interpleader statutes, had not provided for a decision which would enable the defendant in the action, or the person against whom claims were threatened, to know to whom he was to account,* and I think Mr. Winn is right in saying that the order on the interpleder issue in the form in which it was made in this case, *is not an action but a proceeding in the action against the warehousemen* … Now, if that is the object of the statute and the rules, it seems to me the court has not got to inguire as to whether one of the claimants is a person who could or could not bring an action for tort against the other claimants. *All the court*

has to determine is whether or not it is necessary, for the purpose of assisting by the means of interpleader, the defendant in the action, to make an order which will enable him to know to whom he has got to account.

His Lordship then referred to history of the rules and said:

That is provided for now by rules which were passed under the Judicature Act 1875, and now authorised under the Supreme Court of Judicature (Consolidation) Act 1925, and it is not suggested that those rules, or any of them, are ultra vires.

The most important of them for the purpose of deciding this case seems to me to be RSC O 57, r 7, which says:

> If the claimants appear in pursuance of the summons, the court or a judge may order either that any claimant be made a defendant in any action already commenced in respect of the subject-matter in dispute in lieu of or in addition to the applicant, or *that an issue between the claimants be stated and tried,* and in the latter case may direct which of the claimants is to be plaintiff, and which defendant.

Now, how does the court determine whether these two people are claimants? Not by considering whether the one can claim against the other, but by considering whether they are two people who are making claims against the defendant in the action; and undoubtedly the husband, Mr De La Rue, was making a claim which he wanted to enforce by an action against the warehousemen, the defendants. The wife, although she had not issued a writ, had put forward a claim against the warehousemen; and there were therefore before the master in deciding this matter two claimants, one who had actually issued the writ, and the other who had not issued a writ but had put in a claim; and there being two claimants, it seems to me quite clear that there was jurisdiction to make an order under RSC O 57, r 7, and to decide that an issue should be directed, and also to say which of the two claimants should be, not a plaintiff in the technical sense of the word, *because it is not an action, but in the position of a plaintiff: that is to say, who shall be the claimant who has got to make out his case against the other.* Quite properly, the learned master decided that the claimant ought to be the husband, because the deposit with the warehousemen had been made by the wife, and she was in the position of a person in possession, having nine-tenths of the law. The other tenth appeared to enable the husband to succeed in the claim … *An interpleader order of this kind, an issue directed under the rules, is not an action for tort brought by the husband against the wife; it is a method provided by law for the relief of a defendant who has two claimants making claims against him;*

[35] In a separate judgment, Greene LJ said:

What, in substance, all along, both under the old equitable procedure and under the modern procedure, is being decided, *is claims by two claimants against the person interpleading. What really happens is that whereas there are two claimants who are harassing a person desirous of interpleading, that person is interpleading by the interpleader proceedings calling upon the claimants to come out into the open and formulate their claims against him.*

> In substance, when an interpleader issue is tried, two actions against the person interpleading are being dealt with, and interpleader proceedings is the method of compelling the parties — either one, or both, or neither of whom may have actually issued a writ — to prosecute their claims. As it is the essence of interpleader proceedings that the person who has interpleaded has no title himself he naturally drops out of the suit. But in effect the entire matter is tried out in the presence of all the parties concerned, *and the real claimants are compelled to put forwards their claims and have them adjudicated upon. The reason for that is not their own benefit, it is for the relief of the person interpleading.*
>
> When it is once appreciated that that is the true nature and history of interpleader proceedings, *I take the view that it is quite wrong to treat an issue directed under the interpleader rules as though it were an action of tort.* It is a method to enable the court to decide the claims between two persons present at the proceedings, and to decide those claims so that the person interpleading will get the relief to which he is entitled.

[36] Apply the interpleader principles enunciated in *De La Rue* to the present appeal. In applying for the interpleader relief, the plaintiff was not bringing an action or making a claim against the first or the second defendants. In the face of what it took to be countervailing claims by the first and second defendants, the plaintiff filed the interpleader summons seeking assistance from the court — to get relief from the court and get it decided to whom it should account for the 18 document of titles. The summons called upon the first and the second defendants to come to court to put forward their claims and have them adjudicated upon. For the purpose of adjudication, the court is provided with a number of powers. Order 17 r 5 of the RHC provides:

> Powers of Court hearing summons (O 17 r 5)
>
> (1) Where on the hearing of a summons under this Order all the persons by whom adverse claims to the subject-matter in dispute (hereafter in this Order referred to as 'the claimants') appear, the Court may order-
>
> (a) that any claimant be made a defendant in any action pending with respect to the subject-matter in dispute in substitution for or in addition to the applicant for relief under his Order; or
>
> (b) that *an issue between the claimants be stated and tried and may direct which of the claimants is to be plaintiff and which defendant.*
>
> (2) Where —
>
> (a) the applicant on a summons under this Order is a sheriff; or
>
> (b) all the claimants consent or any of them so requests; or
>
> (c) *the question at issue between the claimants is a 'question of law and the facts are not in dispute, the Court may summarily determine the question at issue between the claimants* and make an order accordingly on such terms as may be just.
>
> (3) Where a claimant, having been duly served with a summons for relief

> under this Order, does not appear on the hearing of the summons or, having appeared, fails or refuses to comply with an order made in the proceedings, the Court may make an order declaring the claimant, and all persons claiming under him, for ever barred from prosecuting his claim against the applicant for such relief and all persons claiming under him, but such an order shall not affect the rights of the claimants as between themselves.

[37] The court is also provided with other powers which include the following:

(a) power to order sale of goods taken in execution (O 17 r 6);

(b) power to stay proceedings (O 17 r 7); and

(c) power to make such order as to costs or any other matter as it think just (O 17 r 8).

[38] Provision for discovery and inspection of documents as well as interrogatories is also provided under O 17 (see r 10). There is also provision for trial of interpleader issue (see r 11). However, what is clear is that under O 17 of the RHC there is no provision to enable a counterclaim to be made against a person who applies for interpleader relief.

[39] Given the nature and object of an interpleader proceeding as we have explained, the question is, was the Court of Appeal right in considering the counterclaim (made by the second defendant in his affidavit in opposition to the plaintiff's interpleader application) and ordering the plaintiff to pay to the second defendant damages to be assessed? This takes us back to the decision of the Court of Appeal.

[40] The discretionary relief of interpleader (provided under O 17 r 1(a) of the RHC) will not be granted unless there appears to be some real foundation for expectation of a rival claim (see *Watson v Park Royal (Caterers) Ltd* [1961] 2 All ER 346, *Chin Leong Soon & Ors v Len Chee Omnibus Co Ltd*). It appears from its judgment that the Court of Appeal was not satisfied on the evidence, that the precondition that there must appear to be some real foundation for such expectation was made out. In other words, the precondition that the plaintiff 'expects to be sued' in respect of the documents of titles 'by two or more persons making adverse claims thereto' required under O 17 r 1(a) had not been fulfilled. In its judgment the Court of Appeal said:

> *And a mere 'direction and warning' from the second respondent not to release the 18 original issue documents of titles cannot be construed as a claim against the first respondent.* We will now reproduce the letter dated 10 May 2007 from the solicitors for the second respondent addressed directly to the first respondent and that letter

will show that there was no 'direction or warning' from the solicitors of the second respondent but rather it was couched in general terms as a mere statement and nothing else. That letter was worded as follows (see pp 327–328 of *Bahagian* 'C' *Jilid* 3):

With regard to the demand for the return of the said titles, *please take note* of the following:-

(i) our client Bintang Merdu has applied to the High Court to remove the arbitrator in this matter on grounds of misconduct;

(ii) our client has also applied to amend the above application to set aside the interim 'Award' also for misconduct;

(iii) our client has also applied by Summons for (an) Injunction to restrain the arbitrator and the Claimant Tan Kau Tiah from taking further steps in this matter, and this application is part heard before the Honourable Judge of the High Court; and

(iv) the 'interim Award' has not been registered, and it is our client's intention to vigorously oppose any application to do so.

It is our client's view that the titles should be held by you as (a) stakeholder until the dispute is resolved, which is not the case at present.

We trust (that) you will take into consideration the above matter in carrying (out) your duties as (a) stakeholder in this matter and in deciding the status of the said titles.

[41] We accept the finding that the letter dated 10 May 2007 was not a 'direction or warning' from the first defendant to the plaintiff, and that it did not amount to a claim by the first defendant to the title. The letter merely stated the first defendant's view that the plaintiff should continue to hold title until the dispute between the first and second defendant was resolved.

[42] Order 17 r 3(3)(b) of the RHC also requires that an interpleader summons must be supported by evidence that the applicant:

(a) claims no interest in the subject matter in dispute other than for charges or costs;

(b) does not collude with any of the claimants to that subject matter; and

(c) is willing to pay or transfer that subject-matter into court or to dispose of it as the court may direct.

[43] In the present appeal, in addition to finding that there did not appear to be some real foundation for expectation of a rival claim, the Court of Appeal also found that the evidence showed collusion. This is what it said:

We now highlight the following salient facts. Mr Teh Kim Loh is the director of the second respondent and he affirmed the affidavits found at pp 83–107 as well as at pp 165–187 of *Bahagian* 'B' *Jilid* 2. While Mr Teh Kim Teh is the partner of Messrs Teh Kim Teh, Salina & Co and he affirmed the affidavits found at pp 48–58 and at pp 126–143 of *Bahagian* 'B' *Jilid* 2. These two gentlemen are brothers.

On the other hand, Madam Wong Kooi Heong, one of the other partners of the first respondent is the wife of Mr Teh Kim Teh. This would also mean that she is the sister-in-law of Mr Teh Kim Loh.

We set out these salient facts in order to show that there is collusion between the first and the second respondents. It is for this reason that interpleader relief should not be given to the first respondent. Authorities like *Murietta And Others v South American, & C, Company-Dever And Another, Claimants* (1892–93) 9 The Times Law Reports 389; and *Tucker v Morris* (1832) 149 ER 1 C&M 73; 2 LJ Ex 1 state that collusion refers to 'playing the same game' as one of the claimants.

Order 17 r 3(3)(b) of the RHC states as follows:

(3) Subject to paragraph (4), a summons under this rule must be supported by evidence that the applicant—

(b) does not collude with any of the claimants to that subject-matter.

Zainun Ali J (now FCJ) in *RHB Bank v Comax Sdn Bhd & Anor* [1998] MLJU 608; [1999] 3 CLJ 552, at p 557, had this to say of collusion:

On the second precondition, (r 3(3)(b)), it must be shown that the applicant does not collude with any of the claimants to the subject matter. Though the line between interest and collusion is tenuous it is nevertheless obvious that there must be no identification of interest between the applicant and the claimant. *Collusion does not necessarily envisage something which is morally wrong, but only that the applicant must not 'play on the same side' as one of the claimants (Murrieta's case) as well as Tucker v Morris* [1832] 1 C&M 73; 2 LJ Ex 1.

Mr Teh Kim Teh affirmed, on 25 June 2007, an affidavit in support of the interpleader application where at para 13 of the said affidavit, he deposed as follows (see p 58 of *Bahagian* 'B' *Jilid* 2):

My partners and I decided to make this application as we were stakeholders without any interests nor do we take the side of any parties in the land title issue and is only making this application for direction from this Honourable Court.

But no where in the affidavit in support was there any averment by Mr Teh Kim Teh that he did not collude with anyone nor was there an averment in regard to his brother and his wife. There was no transparency in his affidavit in support. The evidence, however, showed collusion. *Since collusion prevailed between the first and the second respondents, the first respondent's application for interpleader relief should have been dismissed with costs by the learned judicial commissioner.*

[44] Stakeholders should be impartial and should not 'play on the same side'

as one of the claimants (see *Murrieta*'s case, and *Fredericks and Pelhams Timber Buildings v Wilkins* [1971] 3 All ER 545. In our view, on the evidence, the aforesaid finding of the Court of Appeal can be supported. Having so found, the Court of Appeal concluded that the plaintiff's application for interpleader relief should have been dismissed with costs by the learned judicial commissioner. Consequently, the Court of Appeal should only have set aside the decision of the High Court. It did not do so. Instead, it proceeded to consider the second defendant's counterclaim. In doing so, the Court of Appeal misdirected itself. This is what it said:

> [95] We now turn to the appellant's counterclaim that was not considered by the learned judicial commissioner but was raised in the appellant's memorandum of appeal. In his affidavit in reply that was affirmed on 3 August 2007 as seen at pp 80–81 at paras 32–37 of *Bahagian* 'B' *Jilid* 2, the appellant averred as follows:
>
> > 32. From the facts as disclosed, particularly with the arbitral Award, having been handed down in my favour, I am advised by my solicitors whom I verily believe that the Plaintiff (referring to the first respondent) is in gross breach of their joint and several duties/obligations as stakeholders to me.
> >
> > 33. Now, to compound my suffering, the Plaintiff (referring to the first respondent) vex me with this action.
> >
> > 34. This action has, as I am advised by my solicitors whom I verily believe and who to quote a learned High Court judge, a special aggravating element where the Plaintiff's (referring to the first respondent) act of breaches of their stakeholders' obligations have an element of subtlety. By engaging lawyers and invoking legal process, this action and acts of the plaintiff (referring to the first respondent) have an outward appearance of professionalism, sophistication and legality. Such a modus operandi make me but a helpless victim.
> >
> > 35. Without the titles, I am not in a position to take possession of the property and I have suffered not only financially but also both in terms of my physical and mental health due to the failure and refusal of the Plaintiff (referring to the first respondent) to discharge their stakeholders' obligations.
> >
> > 36. *I seek to and do counterclaim against the Plaintiff* (referring to the first respondent) for their breaches of their obligations and the hurt caused to me both physical and mental. I seek the return of my property in the form of the titles wrongfully being detained by the Plaintiff (referring to the first respondent) and for general, exemplary and aggravated damages that I have suffered at their hands, the same whereof to be assessed by this Honourable Court.
> >
> > 37. *I also seek to and do counterclaim against the Plaintiff* (referring to the first respondent) for causing me to lose the 19th title allegedly surrendered for the construction of a sewerage treatment plant, which alleged surrender was not brought to my attention at all prior to the release thereof by the Plaintiff (referring to the first respondent).
>
> [96] The appellant's counterclaim was also raised during the proceedings before the learned judicial commissioner. Order 28 r 7 of the RHC allows the appellant to raise the counterclaim in the originating summons of the first respondent. In contesting

the counterclaim raised by the appellant, the first respondent takes the position that in an interpleader proceeding, no counterclaim was ever allowed. We beg to disagree.

[97] This appeal brings into sharp focus the question of whether the defendant (like the appellant at hand) in an action begun by originating summons for which no appearance need be entered may make a counterclaim in the action. We would answer this question in the affirmative. Lord Bridge of Harwich, in a separate judgment, said in *Metal Scrap Trade Corpn Ltd v Kate Shipping Co Ltd, The Gladys* [1990] 1 WLR 115, at p 117:

> If the subject matter of the counterclaim is wholly unrelated to the subject matter of the claim, that may well be a ground for striking out the counterclaim under RSC, O 28, r 7(3). But where, as here, the subject matter of the claim and counterclaim are inseparably interconnected, the proposition that they ought to be disposed of in separate proceedings flies in the teeth of the common sense and common justice of the case.

[98] This court in *Perwira Habib Bank (M) Bhd lwn Loo & Sons Realty Sdn Bhd & satu lagi (No 2)* [1996] 3 MLJ 421 CA, held that an information contained in affidavits for action commenced by way of originating summons under O 28 of the RHC is sufficient to amount to information required by O 28 r 7 of the RHC as to amount to a counterclaim. This court also held that the language used in O 28 r 7(2) of the RHC is simple, clear and does not require any interpretation.

[45] To digress a little, in its affidavit in reply, the plaintiff disputed the second defendant's counterclaim as untenable and procedurally wrong under the RHC. In that affidavit the plaintiff referred to cll 4 and 6 of the contract. Clause 4 provides as follows:

> Division of Sub-divided Lots
>
> The Landowner and the Developer hereby agree that the legal and beneficial partnership of all the sub-divided lots in the said Land and the industrial buildings to be erected thereon shall be divided as follows:-
>
> (a) Landowner's Lots
>
> The Landowner shall be entitled to twenty-seven per centum (27%) of all the sub-divided complete lots allocated or provided for each type of the industrial buildings (hereinafter referred to as 'the Landowner's Lots') together with the buildings to be erected thereon;
>
> (b) The Developer's Lots
>
> The Developer shall be entitled to seventy-three (73%) of all the sub-divided complete lots allocated or provided for each type of the industrial buildings (hereinafter referred to as 'the Developer's Lots') together with the buildings to be erected thereon;
>
> (c) Odd Lots

All sub-divided incomplete lots which cannot be used for construction of complete units of buildings thereon (hereinafter referred to as 'the odd lots') shall be shared equally between the Landowner and the Developer, that is to say 50% to the Landowner and 50% to the Developer.

(d) Distribution in Kind

The distribution of the Landowner's Lots and the Developer's Lots together with the buildings to be thereon shall be made in kind in the proportion herein above set out. In the event that any of the sub divided lots cannot be distributed as one complete unit to either the Landowner or the Developer such sub-divided lot shall be sold at a fair market value and the proceeds thereof shall be paid to the parties hereto in accordance with their respective entitlements in respect of that sub-divided lot.

(e) Determination of Respective Lots

The Landowner's Lots as well as the Developer's Lots shall be determined by the parties hereto within one (1) month of obtaining the approval for the layout plan for the said Land; Provided always that the Landowner shall have the first right of choice of the Landowner's Lots for each type of the industrial buildings to be erected thereon within the said one (1) month's period.

Clause 6 of the contract provides:

Release of Title Deeds

The said Solicitors are hereby authorised by the parties hereto to release the title deed for the said Land to the relevant authorities for conversion and or sub-division purposes and thereafter to surrender the said title deed to the relevant land office or registry in exchange for the separate title deeds for the sub-divided lots after approval for sub-division of the said Land has been granted by the relevant authorities. *The said Solicitors are hereby expressly authorised by the parties, hereto to release the separate title deeds in respect of Landowner's Lots to the Landowner upon request by the Landowner or his or his nominee's or nominees' solicitors. The said Solicitors are hereby further authorised to release any of the separate title deeds for the Developer's Lots to the purchaser of such lot upon instructions of the Developer and in the event of the said purchaser has been granted a loan from a financial institution to complete the said purchase the said Solicitors are hereby authorised to release the separate title deed to the financial institution or its solicitors as security for the loan, upon valid and proper undertakings from the said financial institution.* Upon completion of construction of all the buildings on the said Land the said Solicitors shall release the title deeds for all the unsold Developer's Lots (if any) to the Developer.

[46] Relying on the two clauses, in its affidavit in reply the plaintiff said:

7.(a) … clause 4 of the JVA provides the mode for distribution of the sub-divided lots between the 1st and 2nd Defendants after the layout approvals for the subject land have been granted by the authorities.

(b) Then, clause 4(a) states that the 2nd Defendant would be entitled to only

27% of the sub-divided lots and this percentage was then increased to 30% ('2nd Defendant's Lots') pursuant to the Supplemental Agreement dated 23.4.1998.

(c) Further, clause 4(b) states that the remaining 78% of the sub-divided lots would belong to the 1st Defendant and was subsequently reduced to 70% ('1st Defendant's Lots') in the said Supplemental Agreement.

(d) Thereon, clause 6 provides that only the title deeds for the 2nd Defendant's lots would be released to the 2nd Defendant. The titles deeds for the 1st Defendant's Lots would be released to the purchasers of the 1st Defendant itself. However, the above distribution would only be possible after the 1st Defendant's Lots and the 2nd Defendant's Lots have been duly detemined pursuant to clause 4 of the JVA.

(e) Hence, until the sub-divided lots are duly distributed as 1st Defendant's Lots and 2nd Defendant's Lots, all 18 title deeds are to be held by my firm as stakeholders for both the 1st Defendant and 2nd Defendant.

8. I wish to inform this Honourable Court that as stakeholder solicitors, we are unable to release the title deeds to either the 1st or 2nd Defendant because:-

(a) Since the 1st Defendant's Lots and 2nd Defendant's Lots have not been duly identified by the above parties, we were unable to ascertain which title deeds belong to the 1st defendant and which other title deeds belong to the 2nd Defendant.

(b) As stakeholder solicitors, it is not my firm's function or rights to decide for the above parties whether or not the JVA has been terminated. Instead, until the disputes between the above parties have fully settled, it is our solemn duty as stakeholder solicitors to hold onto the said 18 title deeds as trustees for both the 1st Defendant as the Developer and 2nd Defendant as the Landowner.

9. With regards to paragraph 14 of the 2nd Defendant's Affidavit, we wish to reiterate that since the disputes between the parties have yet to be settled, we are unable to release the 18 title deeds to the 2nd Defendant.

The stance taken by the plaintiff was that as a stakeholder for both the defendants, it would comply with the arbitral award provided that the award was proper, valid, binding and was duly registered in the High Court. At the time when the plaintiff applied for the interpleader relief, the High Court had not decided on the application by the first defendant for the removal of the arbitrator for misconduct and the application by the second defendant for leave to enforce the arbitral award. The Court of Appeal opined that under s 17 of the Arbitration Act 1952, the arbitral award was final and binding. On s 27 of the Arbitration Act 1952, the Court of Appeal opined that the section did not say that the lack of leave to enforce would make the arbitral award not valid or non-binding. The Court of Appeal also said that since the plaintiff did not participate in the arbitration, there was no necessity to seek leave of the court to enforce the arbitral award against the plaintiff. Learned counsel for the plaintiff submitted that the arbitral award was not final until it was registered in a High

Court. In support he cited the decision of the Court of Appeal in *Mobikom Sdn Bhd v Inmiss Communication Sdn Bhd* [2007] 3 MLJ 316; [2007] 3 AMR 195, where the Court of Appeal held that an arbitrator's award was not final and binding and thus could still be challenged by any of the parties, until it was registered and accepted as a judgment by leave of the High Court. On the facts, the defendant had no registered award and all it had was a cause of action at common law to enforce the award in the usual way by means of a civil suit. So, in the context of the present appeal, the plaintiff may have justification in acting the way it did in this case. In saying all this the court is not making any decision on the merits of the second defendant's counterclaim for damages or the plaintiff's averment in its defence. In fact in our view, it cannot and must not do so. The decision on the merits of the second defendant's claim for damages against the plaintiff and the plaintiff's defence would have to be decided in the hearing which must, in our view, be pursuant to filing of a separate action by the second defendant against the plaintiff, and not in the application for interpleader relief like the one which is now the subject of the present appeal. We revert to the judgment of the Court of Appeal.

[47] Having justified its decision to consider the counterclaim, the Court of Appeal said:

> It cannot be denied that with the multiple suits and applications launched by the first and second respondents, they have succeeded in delaying their obligations under and pursuant to the arbitral award. All these tactical manoeuvrings not only defeats the appellant's right as the registered proprietor of the 18 land titles but it also defeats the purpose of having an arbitration which is said to be quick and cheap.
>
> The finality of the arbitral award cannot be doubted. And once the arbitral award was handed down by the arbitrator in favour of the appellant, the undertaking by the first respondent would come into play. The first respondent stakeholders' undertaking must accordingly be given effect.
>
> For the reasons adumbrated above, we allow the appellant's appeal with costs of RM20,000. We set aside the decision of the learned judicial commissioner given on 6 March 2008.
>
> We order the first respondent to forthwith, and not later than ten days from the date of the service of the order of this court, return the 18 original issue documents of titles as particularised herein to the appellant:
>
> (a) HSM 21306 PT 28543 Sek 4 Mukim Kapar, District Klang;
>
> (b) HSM 21307 PT 28544 Sek 4 Mukim Kapar, District Klang;
>
> (c) HSM 21308 PT 28545 Sek 4 Mukim Kapar, District Klang;
>
> (d) HSM 21309 PT 28546 Sek 4 Mukim Kapar, District Klang;
>
> (e) HSM 21310 PT 28547 Sek 4 Mukim Kapar, District Klang;
>
> (f) HSM 21311 PT 28548 Sek 4 Mukim Kapar, District Klang;
>
> (g) HSM 21312 PT 28549 Sek 4 Mukim Kapar, District Klang;

(h) HSM 21313 PT 28550 Sek 4 Mukim Kapar, District Klang;

(i) HSM 21314 PT 28551 Sek 4 Mukim Kapar, District Klang;

(j) HSM 21315 PT 28552 Sek 4 Mukim Kapar, District Klang;

(k) HSM 21316 PT 28553 Sek 4 Mukim Kapar, District Klang;

(l) HSM 21317 PT 28554 Sek 4 Mukim Kapar, District Klang;

(m) HSM 21318 PT 28555 Sek 4 Mukim Kapar, District Klang;

(n) HSM 21319 PT 28556 Sek 4 Mukim Kapar, District Klang;

(o) HSM 21320 PT 28557 Sek 4 Mukim Kapar, District Klang;

(p) HSM 21321 PT 28558 Sek 4 Mukim Kapar, District Klang;

(q) HSM 21322 PT 28559 Sek 4 Mukim Kapar, District Klang; and

(r) HSM 21323 PT 28560 Sek 4 Mukim Kapar, District Klang;

General damages for loss of use of the aforesaid property, aggravated damages for wrongful detention of the aforesaid property, and exemplary damages are to be assessed by the senior assistant registrar of the High Court at Kuala Lumpur and once assessed they are to be paid to the appellant by the first respondent. The costs of such assessments are to be borne by the the first respondent.

All damages are to carry interest at 8%pa from 4 May 2007 until one day before the order to be made. Thereafter, on all heads of damages including pre-order interest would be at 8%pa from the date of the order until full realisation thereof.

[48] That, in our view, was a misdirection warranting appellate intervention. In considering and allowing the counterclaim made by the second defendant in his affidavit filed in opposing the plaintiff's interpleader summons, the Court of Appeal relied on O 28 r 7(2) of the RHC which it opined was 'simple, clear and does not require any interpretation'. The Court of Appeal also relied on the statement of Lord Bridge of Harwich in the House of Lords' case of *Metal Scrap Trade Corpn Ltd v Kate Shipping Co Ltd, The Gladys* [1990] 1 WLR 115 at p 117, and the decision of the Court of Appeal in *Perwira Habib Bank (M) Bhd lwn Loo & Sons Realty Bhd & Satu Lagi (No 2)* [1996] 3 MLJ 421. With respect, we have a different view. In *Metal Scrap Trade* the court was concerned with application to strike out a counterclaim under the English RSC, O 28 r 7(3). The court was not dealing with the issue relating to counterclaim for damages made in an affidavit in opposition to an application for interpleader relief. Admittedly, in *Perwira Habib Bank*, the Court of Appeal held that information contained in the affidavits of the respondents filed in an action commenced by originating summons under O 28 of the RHC amounted to a counterclaim under O 28 r 7 of the RHC. However, again, in that case the court was not dealing with a counterclaim for damages made in an affidavit opposing an application for interpleader summons.

[49] Order 28 r 7(1) of the RHC which formed the basis of the Court of Appeal's decision provides:

> (1) A defendant to *an action* begun by originating summons who has entered an appearance to the summons and who alleges that he has any claim or is entitled to any relief or remedy against the plaintiff in respect of any matter (whenever and however arising) *may make a counterclaim* in the action in respect of that matter instead of bringing a separate action.

However, as we have explained elsewhere in this judgment, in applying for interpleader summons, the plaintiff was not bringing an action or making a claim against the second or the first defendants. If there was no claim how could there be a counterclaim? More importantly, as we have said, an interpleader summons is a type of originating summons excepted under O 28 r 1 of the RHC from the originating summons procedure under O 28 of the RHC. The plaintiff came to the High Court seeking for interpleader relief, seeking decision of the court as to whom he should account for the 18 documents of title. All that the court had to determine was whether or not it was necessary, for the purpose of assisting by means of interpleader, to make an order which would enable the plaintiff to know to whom he had to account for the documents of titles (applying *De La Rue*). For this purpose the interpleader summons called upon the first and the second defendants to come out and state their claims so that the court could decide to whom the plaintiff should account for the documents of titles. That was where the affidavits filed by the first and second defendants came into play. They should contain the particulars of their respective claims to the documents of titles.

[50] On hearing the interpleader summons, if the preconditions under O 17 r 1 of the RHC and O 17 r 3 of the RHC are not satisfied, the court should dismiss the summons. On the other hand if the preconditions under O 17 rr 1 and 3 of the RHC are satisfied, then the court may make any of the orders provided under O 17 r 5 of the RHC as appropriate. The court may order that an issue (in this case the issue relating to the 18 documents of title) be stated and tried, and may direct which of the claimants is to be plaintiff and which defendant. For this purpose provisions for discovery and inspection of documents as well as interrogatories, and for trial of interpleader issue are provided under O 17 of the RHC. Where all the claimants consent or any of them so requests, or the question at issue between the claimants is a question of law and the facts are not in dispute, the court may 'summarily determine the question at issue between the claimants' and make an order accordingly on terms as may be just. It is important to note that the summary determination provided is for 'the question at issue between the claimants' not between the claimants or any of them with the interpleader applicant. Even then it does not mean that the issue can be determined straight away out of hand. The words 'may summarily determine the question at issue' under O 17 r 5(2) of the RHC means only that the question could be determined without an issue being

stated or tried. In *P B J Davis Manufacturing Co Ltd v Fahn (Fahn claimant)* [1967] 2 All ER 1274, in explaining the meaning of 'may summarily determine the question at issue' in RSC, O 17 r 5(2), Lord Denning MR said:

> This is an interpleader case. The execution creditor obtained judgment against Mr Fahn for goods sold and delivered. The total sum was £263 14s 6d. A writ of execution was issued and the sheriff took possession of the goods at Flat 3, Queen's Court, 33 Lordship Lane, N16. The wife, Mrs Fahn, claimed that all the furniture and contents belonged to her. Whereupon the sheriff took out an interpleader summons and served the execution creditor.
>
> The summons came on before the Master on Apr 12. Mrs Fahn, the claimant, made an affidavit saying that some of the furniture belonged to her on hire-purchase. Other of the furniture was her own property, having been bought by her outright or on hire-purchase fully paid. The master adjourned the summons for an answer. It came on again on Apr 28. *On the hearing of the summons it was open to the master 'summarily' to determine the Question (see RSC, O 17, r 5(2)); but 'summarily' there does not mean that he can determine it straight away out of hand. It means only that he can determine it himself without directing an issue (see Re Tarn (1)). The usual practice of the master when he 'summarily' determines the question, is to give a special appointment at which evidence can be taken orally and the witnesses can be cross-examined; and at which the relevant documents can be produced.* In this case the solicitor for the execution creditor asked for a special appointment; but the master said that it was only a fortnight before the end of term. He could not fit in any special appointment. So he would deal with it straight away. He did so. He made an order in favour of the claimant, the wife. The order was that 'the claim be allowed and the sheriff withdraw from possession of the goods seized by him under the writ of fi fa'.
>
> The execution creditor appeals from that order of the master. He contends that the master ought to have given a special appointment and ought not to have determined the matter out of hand as he did. *I fear that the master was in error in deciding it straight away as he did. When a wife puts in a claim to all the furniture in a house, the execution creditor can properly ask that she give her evidence on oath and be cross-examined; and that there should be discovery of documents in order to test whether her claim is good. The master should give a special appointment for the purpose. So I think that the master's order must be set aside* and a special appointment must be made.

[51] On the powers of the court at the hearing of the interpleader summons very useful and instructive guides are also provided by *Malaysian Rules of Court 2012, An Annotation*, by Lexis Nexis where at pp 298–299, the commentary on O 17 r 5 of the Rules of Court 2012 (the same as O 17 r 5 RHC) is as follows:

> At the hearing of the originating summons or notice of application, the court is entitled to make one of the following *alternative orders*:
>
> (1) *Dismiss the originating summons or notice of application if rr 1 and 3 are not satisfied;*
>
> (2) *Decide the merits of the application summarily (r 5(2)). By 'summarily', it is not meant that the court can determine the Question immediately out of hand*

> *but that the court can determine it without directing an issue:Re Tarn* [1893] 2 Ch 280. Summary disposal is commonly adopted in clear and straightforward cases, for example, where expedition is desirable in cases where goods are likely to deteriorate if proceedings are delayed. Where the goods are of considerable value and there are difficult questions of law, summary disposal of the matter will be inappropriate: *Fredericks and Pelhams Timber Buildings v Wilkins* [1971] 3 All ER 545; [1971] 1 WLR 1197, CA (Eng). The usual practice at summary hearing will be for the court to give a special appointment at which evidence can be taken orally and the witnesses cross-examined and the relevant documents produced: *P B J Davis Manufacturing Co v Fahn, etc* [1967] 2 All ER 1274; [1967] 1 WLR 1059.

[52] In our judgment, having found (rightly in our view) that the requirements under O 17 r 1(a) and O 17 r 3(3)(b) of the RHC had not been satisfied, and having held that the application for interpleader relief should have been dismissed by the High Court, the Court of Appeal should have just set aside the decision of the High Court. The Court of Appeal could not then proceed to consider the counterclaim of the second defendant, allowed it and ordered damages (which was to be assessed) to be paid by the plaintiff to the second defendant. The Court of Appeal had no jurisdiction to do so.

[53] In defence of the decision of the Court of Appeal on the counterclaim, learned counsel for the second defendant also relied on O 17 r 8 of the RHC. That rule provides that:

> Subject to the foregoing rules of this Order, the Court may in or for the purposes of any interpleader proceedings make such order as to costs or any other matter as it thinks just.

[54] Learned counsel contended that that provision was very wide and it allowed the Court of Appeal to consider and allow the second defendant's counterclaim. In support of his submission, learned counsel relied on *BP Benzin und Petroleum AG v European-American Banking Corporn* [1978] 1 Lloyd's Rep 364 (CA). We are unable to agree. It is true that in *BP Benzin* the English Court of Appeal dealt with the English RSC, O 17 r 8 which contained a similar provision as our O 17 r 8. Nonethess, on the facts, *BP Benzin* and the present appeal are poles apart. In that case, the defendant banking corporation loaned large sums of money to the Colocotronis companies to enable them to purchase ships for their fleet, the amount being guaranteed by four members of Colocotronis and secured by mortgages on ships belonging to Panamanian companies in which Colocotronis were shareholders. The market fell in December 1975 and the banking corporation demanded further security but left the running of the ships to Colocotronis or their agents. However disputes arose and in October 1976, the banking corporation called in the loan and

began to realise some of the securities. Three of the ships, Champion Colocotronis, Courageous Colocotronis and Topaz were on time charter to the plaintiff, and for a time the charter hire was paid to the banking corporation. The banking corporation used the proceeds to pay out current expenses on the ships and in reduction of part of the outstanding indebtedness. Colocotronis protested, contending that the loans and all dealings with the banking corporation were void since the banking corporation was a moneylender and was not registered as such and they (Colocotronis) were entitled to the charter hire, since they owned the Panamanian companies. The plaintiffs paid the charter hire on the three ships into a joint account and claimed interpleader relief. Goff J held that since the disbursements were disbursements which had been paid out in order to earn the charter hire, it was only fair and just that those disbursements and expenses should come out of the moneys which had been paid into the joint account. Colocotronis' appeal to the Court of Appeal was dismissed. In his judgment Lord Denning MR, after setting out the facts of the case said:

> The BP companies were thus faced with claims on the one hand by the New York banking corporation and on the other hand by the Colocotronis family. So the BP companies *interpleaded. They paid the sums of charter hire for two months, at all events, into a joint account.* There was a $1,000,000 hire on the Champion Colocotronis and the Courageous Colocotronis which was paid into the joint account, and on the Topaz about $71,000 was paid in. That was paid into a joint account for the months of June and July this year. After June and July, by some arrangement, the BP companies did not pay the moneys into the joint account anymore. They paid them to the New York banking corporation under suitable guarantees: but we are concerned at the moment with the moneys — well over $1,000,000 — which were paid into the joint account. *Now the question is what is to happen to the moneys in the joint account.* Expenses have been incurred for running these ships. Two of them have been sold by the mortgagees, again under suitable indemnities and guarantees, the charter-parties remaining in being. But the Topaz has not been sold, and is still running. At all events, the important thing to notice is large sums have been paid by the bank in operating expenses for these vessels. The banking corporation say that these operating expenses, both before June and July and after, are to be calculated and should be paid out of the joint account. Not only the June and July expenses, but the other expenses should be paid out of the joint account, having been incurred on behalf of the vessels in order to keep them running. But, on the other hand, the Colocotronis family say that is not so. *The interpleader issue is as to the right to this charter hire* and there is no reason, they say, in point of law why the money in the joint account should be saddled with the disbursements and expenses incurred before June and July. *The arguments raise a point for consideration as to the jurisdiction of the court on interpleader issues.* Mr Justice Goff gave a wide interpretation to RSC, O 17, r 8 of the rules, which says:
>
> > … The Court may in or for the purposes of any interpleader proceedings, make such order as to costs or any other matter as it thinks just.

> That order has been construed widely. It is quite clear that the court can make an order for sale of the property if need be, certainly if it is pledged, and if it is not pledged it can be sold. The case of *Paquin Ltd v Robinson: Viola,* (1901) 85 LT 5 shows that property can be sold, not merely perishable goods but other property. That is a clear interference with rights. But I would put it wider than that. It seems to me under the inherent jurisdiction of the court, when an interpleader is taken out, the court can make such order as it thinks just in the matter even though it does interfere with the rights of the parties if that is the just solution of the case. On this wider interpretation, it seems to me the order made by Mr Justice Goff can certainly be justified. There he points out that these disbursements are disbursements which have been paid out — they are obligations of the ship owning company — in order to earn the charter hire. Surely it is only fair and just that those disbursements and expenses should come out of the moneys which have been accumulating, *such as those which have been paid into the joint account in the interpleader issue.* It seems to me the justice of the case is as Mr Justice Goff has said, and I think the jurisdiction of the court, whether put under the rules or under the inherent jurisdiction, is ample for the court to do what is right and just. Therefore I would dismiss the appeal.

[55] Firstly, it is clear that in *BP Benzin* the courts were not dealing with any counterclaim in the like of what was made by the second defendant in this case. Indeed there was no counter claim. Secondly, unlike in the present case where the Court of Appeal held that the application for interpleader relief should have been dismissed (in other words leave to interplead should not have been given), in *BP Benzin*, the plaintiff had been given leave to interplead as a result of which the money in question was put in a joint account. This is clear from the judgment of Lord Justice Roskill:

> *The two British Petroleum companies have been given leave to interplead. As a result the money in question,* which is a large sum of deutschemarks and a smaller sum of United States dollars, *has been put in a joint account in the Chase Manhattan Bank in the names of the two firms of solicitors concerned. We have to decide how that money should be dealt with at this stage.*

So, in that case the Court of Appeal was not concerned with whether leave to interplead should or should not be given. The Court of Appeal was concerned with the next stage after the leave to interplead was given, and that, at that stage it had to decide on the interpleader issue, namely how to deal with the money from the charter hire. Thus, in our view *BP Benzin* cannot support the Court of Appeal's decision on the second defendant's counterclaim in the present appeal.

ANSWER TO THE LEAVE QUESTION

[56] In the light of what have been said thus far, our answer to the leave

question is in the negative.

CONCLUSION

[57] In the result, the plaintiff's appeal is allowed with costs. The decision of the Court of Appeal is set aside. Consequently, the Court of Appeal's order that general damages for loss of use of the aforesaid property, aggravated damages for wrongful detention of the aforesaid property, and exemplary damages to be assessed by the senior assistant registrar of the High Court (as stated in paras 103–104 of the judgment of the Court of Appeal), is set aside.

[58] The order of the Court of Appeal that the 18 original issue documents of titles were to be returned forthwith and not later than ten days from the date of the Court of Appeal order, is set aside. This is consequential to our decision in allowing the appeal and setting aside the decision of the Court of Appeal in respect of damages. Additionally, as stated earlier in this judgment, following the High Court decisions date 6 March 2008 and 14 July 2009, the plaintiff had, on 11 August 2009 returned the 18 documents of title to the second defendant. In his submission, learned counsel for the second defendant confirmed that the titles were returned on 11 August 2009. Indeed, as we have said, in the present appeal the complaint of the plaintiff is against the decision of the Court of Appeal in allowing the counterclaim of the second defendant and ordering damages to be assessed. Be that as it may, the fact is that by the time the decision was made by the Court of Appeal on 5 March 2010, the 18 documents of titles had already been returned to the second defendant, rendering academic the order of the Court of Appeal directing the return of the titles forthwith. This is another reason why that order should be set aside.

Order accordingly.

Reported by Afiq Mohamad Noor